Supreme Court of the United States.

THE AMERICAN EXPRESS COMPANY,
Plaintiff-in-error,

against

FRED A. MAYNARD, Attorney-General of the State of Michigan, *ex rel.* GEORGE F. MOORE, *et al.*

BRIEF ON BEHALF OF PLAINTIFF-IN-ERROR.

Statement.

The proceeding under review was brought by the Attorney-General of Michigan, on the relation of several merchants of Detroit, to procure a writ of mandamus requiring the American Express Company to accept for transportation all goods which should be tendered to it, and to deliver therefor a receipt bearing the one-cent stamp required by the War Revenue Act, without demanding or requiring the payment of the cost of such stamp by the shipper.

Although it appeared by the petition that the Company was largely engaged in interstate business (Record, pp. 2, 3, 4), the relief sought by the petitioner and granted by the Court (Record, pp. 6, 13), extended as well to the interstate

as to the local business of the Company. Indeed, one of the instances of refusal on the part of the Company to accept a package except upon the shipper's furnishing the cost of the stamp, upon which the petition proceeded, was in relation to a shipment from Michigan to Indiana (Record, p. 8).

Nor was the relief granted by the Michigan Court limited to the persons upon whose relation the proceeding was instituted. Its mandate ran in favor of all shippers or consignors who might tender goods for transportation. Indeed, it is only by implication that the benefits of the writ could be confined to shippers tendering goods within the State of Michigan (Reccord, p. 13).

The plaintiff-in-error, however, does not propose to dwell upon these features of the case. It is of importance to the Express companies, and to the public, that the real question underlying the Attorney-General's application, should be authoritatively determined by the decision of the Court—and we have no desire to weaken the discussion of that question by the introduction of matters which might have, indeed, an important bearing in the particular case before the Court, but which would not be helpful in reaching a conclusion upon the principal question involved.

The cause was heard in the State Court upon petition and answer (Record, p. 1)—and we must, therefore, take the averments of the answer as true. The position taken by the petitioner was that the War Revenue Act imposed upon the carrier the burden of paying the cost of the stamp required to be affixed to bills of lading, and that the exaction of this cost from the shipper constituted a violation by the carrier of the duty imposed upon it by the act (Record p. 4, § 10).

The plaintiff-in-error insisted that the act did not impose the burden of the tax upon the carrier, but left the question as to whether the carrier or the ship-

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per should bear it, a matter of adjustment between the parties (Record, p. 11, § 6).

It also claimed that it had a right to establish reasonable rules and regulations for the conduct of its business, and to fix such rates for its services as it deemed best, provided the same be not unreasonable (Record, p. 11, § 7)—that the passage of the War Revenue Act effected an important change of conditions, so as to make it necessary for the plaintiff-in-error to meet the change by the necessary alterations in its regulations and rates, to prevent its resources from being depleted and its financial condition from being weakened; that to this end "it raised its rates of transportation to an amount reasonable and just, and only necessary to meet the change of conditions made by said Act and save itself from great loss of revenue and profits," etc. (Record, p. 11, § 8).

It also alleged in substance that its requirement that the shipper should, in addition to the former rate, pay the cost of the stamp, was reasonable and just (Record, p. 12).

The tax in question is imposed by Section 6 of the War Revenue Act, which is as follows:

> "Section 6. That on and after the first of day of July, eighteen hundred and ninety-eight, there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this Act, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, shall be written or printed by any person or persons, or party, who shall make, sign, or issue the same, or for whose use or benefit the same shall be made, signed, or issued, the several taxes or sums of money set down in figures against the same, re-

spectively or otherwise specified or set forth in the said schedule. * * *"

The clause of Schedule A, which fixes the amount of the tax is as follows:

"EXPRESS AND FREIGHT. It shall be the duty of every railroad or steamboat company, carrier, express company, or corporation or person whose occupation is to act as such, to issue to the shipper or consignor, or his agent, or person from whom any goods are accepted for transportation, a bill of lading, manifest, or other evidence of receipt and forwarding for each shipment received for carriage and transportation, whether in bulk or in boxes, bales, packages, bundles, or not so inclosed or included; and there shall be duly attached and canceled, as in this Act provided, to each of said bills of lading, manifests, or other memorandum, and to each duplicate thereof, a stamp of the value of one cent: *Provided*, That but one bill of lading shall be required on bundles or packages of newspapers when enclosed in one general bundle at the time of shipment. Any failure to issue such bill of lading, manifest, or other memorandum, as herein provided, shall subject such railroad or steamboat company, carrier, express company, or corporation or person to a penalty of fifty dollars for each offense, and no such bill of lading, manifest, or other memorandum shall be used in evidence unless it shall be duly stamped as aforesaid."

The Supreme Court of Michigan held that this clause imposed upon the carrier the burden of the tax. It said:

"The main question in the case relates to the construction to be placed upon the act in question.

"By the act, every express company is compelled to issue to every shipper or consignor, etc.,

a bill of lading for eacn shipment received for carriage, to which bill of lading and duplicate thereof there shall be attached and cancelled a stamp of the value of one cent. The law therefore imposes upon the carrier the obligation to issue the receipt. * * * This bill must be stamped and the stamp cancelled. It is evident that it is as much the duty of the company to place the stamp upon the receipt and cancel it as it is to issue the receipt. This duty is made more apparent by the fact that the act further provides that failure to issue the receipt makes the carrier so failing amendable to a heavy penalty.

* * * * "We are, therefore, led to the conclusion that the duty to issue the receipt and the penalty affixed for the failure to do so implies that it is to be a receipt which would bring the Government the revenue provided; therefore the act makes it the duty of the company to affix the stamp."

To the suggestion that if this be so, still the company has the right to raise its rates to meet the burden thus imposed, the Court answered:

"It is conceded that the effect of this is to throw the burden upon the shipper. It is apparent upon the face of this proceeding that the very purpose of this change in the regulations and the increase of rates is to avoid the payment of the tax, and thus cast upon the shippers the burden which the act of Congress puts upon the company. This is but an envasion and a subterfuge to avoid the terms of the act."

We submit that these rulings were erroneous.

POINTS.

First Point. The question is as to the construction of the statute; and that, of course, is in the last resort a question of language. There are, however, two or three considerations of a general character which have an important bearing upon the conclusion to be reached.

(*a*). The first of these relates to the *nature of the tax*.

It is of the essential nature of a documentary stamp tax, that the burden should become widely distributed. Such has been the history of taxes of this description whenever they have been imposed, and it has been found in practice that business and commerce speedily adjust themselves to that condition. They belong to the class recognized as *indirect taxes*, which Mr. Mill describes thus:

"Taxes are either direct or indirect. A direct tax is one which is demanded from the person who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person, in the expectation and intention that he shall indemnify himself at the expense of another, such as the excise or customs. The producer or importer of a commodity, is called upon to pay a tax on it, not with the intention to levy a peculiar contribution upon him, but to tax through him the consumer of the commodity, from whom it is supposed he will recover the amount by means of an advance in price."

Principles of Political Economy, Vol. II, p. 415.

This definition was approved by the learned Chief Justice in the Income Tax Case:

"Ordinarily," he said, "all taxes paid primarily, by persons who can shift the burden

upon someone else, or who are under no legal compulsion to pay them, are considered indirect taxes. * * *"

Pollock *vs.* Farmers' Loan and Trust Co., 157, U. S., 558.

It is this very quality of being readily and easily distributable that forms one of the principal recommendations of a stamp tax. Through such an imposition large revenues may be raised by the Government without the tax being felt by the people to be unduly burdensome. Its incidence is widely distributed, and the burden falls upon each individual so lightly that the weight is not appreciated. Hence, it is paid, if not with cheerfulness, at least with as near an approach to that feeling as ever accompanies the payment of a tax.

(*b.*) The view of the Supreme Court of Michigan is that Congress by the act in question has imposed the tax upon express companies, with an implied prohibition against their shifting the burden so as to make it fall upon their customers. Had Congress done the thing thus imputed to it, surely it would have transcended its constitutional powers; for such a tax imposed upon a given person with the intent and the effect that he alone shall bear its burden, without right to shift it upon someone else, is nothing but a *direct* tax, and one, therefore, which can be levied by Congress only under the limitation that it be apportioned among the States, according to population.

Moreover, how could such a prohibition he enforced? There may be cases in which from the nature of the tax it may be imposed upon the very person who must bear its burden. Perhaps an income tax is of that class. But where the

tax is imposed, as stamp taxes are, upon commercial transactions, would not a prohibition against shifting the burden be necessarily futile? It is of the nature of such taxes that the burden should be capable of being shifted. How it is shifted, and the extent to which the process is carried, are determined by the necessities of business and the laws of trade.

(*c*.) What reasonable motive or what justifiable purpose can be imputed to Congress in the enactment of such a law as the Supreme Court of Michigan construes this statute to be?

The raising of revenue is the object in hand. How is that aided by the requirement that he upon whom the tax is primarily laid must alone bear its burden? Is such a consideration within the legitimate purview of Congress? It may be, indeed it doubtless is, the duty of the Legislature in selecting a method of taxation, to adopt that which is most equitable, which involves the least hardship, and which carries with it a burden most easily borne. But this duty would be best fulfilled by the adoption of a tax, the burden of which should be most widely distributed among the greatest possible number, to the end that it should bear with the least possible weight upon each individual.

(*d*) Another consideration of importance in testing the correctness of the view taken of this statute by the Supreme Court of Michigan, is that courts should not lightly impute to the Legislature an intention to restrict the ordinary freedom of contract. Again and again have courts declared that if one thing more than another is required by sound public policy it is that freedom of contract should be left unimpaired. The prohibition which the

Michigan court reads into this act against the shifing of the burden by the carrier is a distinct limitation and impairment of the right of private contract, and the intention to impose it should not be imputed to Congress unless required by the plainest language.

(*e.*) The last general consideration to which we desire to call attention is one which is not confined to the particular kind of tax which is here involved, but is of general application in all cases in which it is claimed that a tax has been imposed.

It was thus formulated by this Court in a case arising under the former stamp tax act upon which the present act was framed.

" If there is a doubt as to the liability of an " instrument to taxation, the construction is in " favor of the exemption, because, in the lan- " guage of Pollock, C. B., in Girr *v.* Scudds, ' a " ' tax cannot be imposed without clear and ex- " ' press words for that purpose.' " (United States *vs.* Isham, 17 Wall. 496).

Such is the principle to be applied when the question is whether a tax has been imposed or not.

We submit that it applies with equal force when it is claimed that a tax which has been admittedly imposed upon a transaction has been in fact imposed exclusively upon one of the parties to such transaction.

Second Point.—Documentary stamp taxes are not designed to fall upon any designated person or class of persons.

The intention of the Legislature is to select

for taxation *transactions* which are of frequent occurrence and which are of such a nature that they are evidenced by documents.

They are the common transactions of ordinary commercial life, and as a rule they are of such a character that the document itself may be said to constitute the transaction; and so the law selects those commercial, financial or legal documents which are in most frequent use, and imposes a tax in respect of the transaction by requiring that a stamp shall be affixed to the document by which the transaction is evidenced, or which constitutes the transaction.

Running through the entire list of transactions mentioned in Schedule A, we find that, with a very few exceptions which will be presently noticed, they are all of such a character that it may be said that the document constitutes the transaction itself. This is true of checks, drafts, certificates of deposit, orders for the payment of money, bills of exchange, letters of credit, bonds, certificates of profits, certificates of damage, marine certificates, certificates required by law, charter parties, conveyances, telegraph dispatches, custom house entries, policies of life insurance, leases and agreements relating to land, mortgages and pledges, passage tickets, powers of attorney, proxies, marine and commercial protests and warehouse receipts. In each of these instances the thing taxed is the transaction; but the document to which the stamp must be affixed is the transaction itself. A tax upon the document is in fact a tax upon the transaction.

There are, indeed, certain exceptional cases in which the transaction intended to be taxed might take place without the creation or delivery of any document. Take the case of a sale of a certificate of stock where the delivery of the thing sold

consists merely in handing over a certificate of stock already assigned in blank by the holder. Here the transaction intended to be taxed is the transfer of ownership, and yet that may take place in the nature of things without any document to evidence it.

So, in the case of a sale or agreement to sell products or merchandise at an exchange or board of trade, there might be a mere verbal agreement of sale, followed by a delivery of the merchandise, and no written evidence of the thing intended to be taxed, viz., the sale, would exist.

In these two cases, therefore, the statute requires that a document capable of receiving a stamp shall be created, and accordingly directs that the seller shall make and deliver to the buyer a bill or memorandum of sale, or agreement to sell, and imposes a penalty upon any person making such sale without the creation of the requisite document.

And so in respect to the transactions of carriage which are intended to be taxed. What is intended to be reached here is every shipment accepted by a carrier for transportaton. It is not, however, in the nature of things, essential to a shipment of goods that it should be accompanied or evidenced by any writing. Here, therefore, as in the case of sales above referred to, the statute requires the only person who is capable of doing it to create and bring into existence a document evidencing the shipment and capable of receiving a stamp. This direction is contained in the "Express and Freight" clause which makes it the duty of the carrier to issue to the shipper, upon every accepted shipment, a bill of lading or other evidence of receipt and forwarding.

The purpose of this requirement is not to determine who shall pay the tax, or who shall affix

the stamp, but to make it the duty of the only party to the transaction who can do it to issue or create a document representing the transaction taxed, and capable of being stamped.

Third Point.—It is a singular circumstance that the Supreme Court of Michigan, while professedly engaged in the task of construing a statute imposing a tax, nevertheless throughout its entire opinion sedulously refrains from any comment upon the only section of the law which in fact imposes the tax!

After saying: "The main question in the case "relates to the construction to be placed upon the "act in question" (Record, p. 19), the Court proceeds to discuss the meaning, not of Section 6, which purports to impose the tax, but of the "Express and Freight clause" of Schedule A, which does not purport upon its face to impose any tax, but relates only to the method of collection and the determination of the amount of the tax imposed by Section 6.

Thus, ignoring the main enactment and considering only an incidental and administrative portion of the Statute, the Court arrives at the meaning of the Act by means of a process admirably well adapted to lead to an erroneous conclusion.

Omitting some of the words for the sake of making the sense more clear, section 6 provides as follows:

> "That on and after the first day of July, eighteen hundred and ninety-eight, there shall be levied, collected and paid, for and in respect of the several * * * things mentioned * * in Schedule A * * * by any person

* * * who shall make, sign or issue the same, *or for whose use or benefit the same shall be made, signed or issued*, the several taxes * * * specified * * * in the said schedule."

These are the only words in the act by which a stamp tax is imposed, or by which any duty to pay such taxes is imposed upon any one.

It is a clear and unambiguous enactment to the effect that all the stamp taxes upon documents mentioned in Schedule A shall be paid either (1) by the person who issues the document, or (2) by the person for whose use or benefit the same is issued.

This provision is in complete accordance with the general and essential nature of such taxes. As we have seen, they are not imposed upon any particular persons or occupations. They are taxes upon commercial and business transactions which are evidenced by, or which consist of, documents.

To each of such transactions there are of necessity two parties—one who makes or signs the document, and the other for whose use or benefit it is made or signed. The subject of the tax is the transaction. To the government, whose only object is revenue, it is a matter of absolute indifference whether the cost of the tax is borne by one party or the other.

Whether, in case of a lease, it is borne by lessor or lessee; in case of a mortgage, by mortgagor or mortgagee; of a draft, by drawer or drawee; of a sale, by vendor or vendee; of a power of attorney, by principal or agent; of a custom house entry, by importer or consumer—all this is a matter with which the government does not concern itself.

So in the case of transportation of goods. The two parties to the transaction are the carrier and

the shipper. The bill of lading or receipt is issued by the carrier for the use or benefit of the shipper; and whether the ultimate expense of the stamp shall be borne by one or the other is left to be determined by the operation of the ordinary laws of trade.

The act bristles with indications of this attitude of the government—its complete indifference as to which party to the transaction pays the tax.

See Section 10, which provides that any person who accepts or pays any bill of exchange, draft or order for the payment of money, without its being duly stamped, is equally guilty with the person who makes, signs or issues such a note unstamped. Section 11, too, requires the acceptor of a bill of exchange, drawn in a foreign country, but payable in the United States, before paying or accepting it, to place a stamp upon it, and provides that a person receiving or taking in payment any such draft without a stamp is equally guilty with the person who pays or negotiates or offers it in payment.

So, too, Section 9, which provides for the cancellation of the stamp, scrupulously avoids saying that the *person issuing* the document shall affix or cancel the stamp. The intent of the act, as shown by Section 6, is that either party may affix the stamp; hence, when Section 9 comes to provide for its cancellation, the person whose duty it is to cancel it is described not as the person who *issued* the document, but as the person "*using or affixing the stamp.*"

Fourth Point. Thus, the terms of Section 6, as well as other parts of the Act, leave it a matter of negotiation and contract between the parties which of them shall bear the burden of the tax.

An examination of the "Express and Freight Clause" of Schedule A will show that it not only requires no different construction, but that it is entirely consistent with this construction of the Act.

This clause first declares that it shall be the duty of every carrier to issue to the shipper from whom any goods are accepted for transportation, a bill of lading, manifest or other evidence of receipt and forwarding.

Then, separated by a semi-colon, follows the provision: "And there shall be duly attached and cancelled, as in this Act provided, to each of said bills of lading * * * a stamp of the value of one cent."

It is to be observed that it does not say *who* shall affix the stamp. The statute carefully employs the impersonal expression, "There shall be attached and cancelled."

Then comes the provision imposing a penalty upon the carrier for failure to issue such bill of lading.

The argument of our opponents, and of the Supreme Court of Michigan, is that here we have a requirement that the carrier shall issue a bill of lading; that such bill of lading shall be stamped; hence, it is the duty of the carrier to stamp it.

An argument which they find strengthened by the provision as to penalty. The bill of lading referred to, they say, is a complete and valid, *i. e.*, a stamped, bill of lading, and any failure by the carrier to issue such (*i. e.*, a stamped) bill of lading subjects him to a penalty. A penalty, therefore, being imposed upon him for not issu-

ing it, is it not plainly made his duty by the Act to issue it?

This argument involves a completely mistaken notion of the scope and purpose of this clause.

As we have already shown, its purpose is to require the carrier upon every transaction of carriage to issue or create a bill of lading capable of being stamped, to the end that each such transaction shall be evidenced by a document.

The penalty imposed is not for failure to issue a stamped bill of lading, but for failure to issue any bill of lading at all; that is, a failure to create the necessary document capable of receiving a stamp.

That this is the true meaning of the clause appears in many ways.

1. It is the meaning most consistent with its language.

2. It is the only meaning consistent with the provisions of Section 6 which imposes the tax indifferently upon the carrier or the shipper.

3. Apply to the clause the meaning which our opponents claim for it, and it results in nonsense. They say that the words "such bill of lading in the penalty clause mean 'stamped bill of lading.'" Translate the phrase accordingly, and we have this: "Any failure to issue (such) a *stamped bill* of lading as herein provided, shall subject such * * * carrier to a penalty of fifty dollars for each offense, and no (such) *stamped* bill of lading * * * shall be used in evidence *unless it shall be duly stamped* as aforesaid! Clearly, this effort at statutory construction is not very successful.

4. But compare this penalty clause with the provisions of Section 13 imposing a penalty for issuing a document required to be stamped

without a stamp being affixed thereto, and the demonstration becomes complete.

In the first place, the penalty is a very different one from that contained in Section 13. The former is merely a penalty of fifty dollars for failure to *issue* a bill of lading, and is imposed irrespective of the question of *intent*. It is the carrier's duty to issue or create the document so that it may be stamped, and no excuse that his failure was innocent and without design will be received.

The penalty imposed by Section 13, on the other hand, is a much more serious matter. It is the penalty which relates to an evasion of the tax.

A person who issues a document mentioned in Schedule A "without *the same being duly stamped, or having thereupon an adhesive stamp for denoting the tax chargeable thereon, and* canceled in the manner required by law." (Note the strict adherence to the impersonal form of expression.) "*With intent to evade the provisions of this Act*," is declared guilty of a misdemeanor, punishable by fine or imprisonment, or both.

This is a general provision applying to every document mentioned in Schedule A. It applies, therefore, to the bill of lading required to be issued by a carrier.

Clearly two such different consequences as the penalty provided in the "Express and Freight Clause," and this much more serious penalty provided in Section 13, cannot be intended to apply indifferently to one and the same offense.

Can anything more clearly denote the difference in the nature of the two offenses described in these two provisions, than this enormous difference in the resulting penalty?

The one, a mere failure to create a document, however inadvertent or innocent it may be, subjects the defaulting party to a penalty of fifty dollars.

This is because his performance of the duty of creating the document is the one essential condition necessary to the collection of the tax.

The other is the issue, with intent to evade the tax, of a document without a stamp. Naturally, this, a much more serious offense, being an intentional evasion of a tax, is visited with a much heavier penalty—fine, imprisonment, or both.

5. That the Supreme Court of Michigan took a wholly erroneous view of the meaning of the penalty provision of the Express and Freight clause is further shown by the discussion in Congress while its terms were under consideration there. Senator Gorman fell into the same error of supposing it to be a penalty for not stamping a bill of lading; but Senator Aldrich, who was in charge of the bill, exposed the error very clearly. The record shows the following:

"MR. GORMAN. * * * I read, beginning at line 10, on page 41;

'Any failure to issue such bill of lading, manifest, receipt or other memorandum shall subject such railroad company, carrier, express company, or corporation or person to a penalty of $50 for each offense.'

MR. ALDRICH.—The Senator from Maryland certainly misapprehends the language there or he has not read it carefully. *That is the penalty for not issuing a bill of lading.*

MR. GORMAN.—Yes.

MR. ALDRICH.—The penalty for not putting a stamp upon one when issued, is a penalty which is applied in another way.

MR. GORMAN.—But it is the same thing precisely.

MR. ALDRICH.—I beg the Senator's pardon. *That is simply a provision that every railroad company must issue a bill of lading, and failing to do that, it must pay a fine of $50.* As to what the penalty shall be for failing to stamp it after issue is another question entirely.

31 Congressional Record, p. 5627.

6. Most significant, too, is the provision in relation to newspapers, to the effect that but one bill of lading should be required on packages of newspapers when enclosed in one general bundle at the time of shipment.

This provision was inserted in the Express and Freight Clause, at the instance of a committee of newspaper publishers who represented to those in charge of the bill the enormous burden that would fall upon them if a bill of lading were required for every separate package of newspapers shipped by express. They insisted that without a limitation Congress would be imposing an undue burden upon the press. This was upon the theory, accepted on all sides during the debate on the bill, that the shipper would in fact have to bear the cost of the stamps.

31 Cong. Rec., pp. 6168–6172.

Fifth Point.—Were the true interpretation of the act such as was adopted by the Michigan Court, the statute would be unconstitutional. According to that interpretation a tax is imposed upon the carrier in respect of each shipment, with an implied prohibition against his shifting the burden of the tax upon others by adding the cost to the rates for transportation.

But it is to be observed that the tax is imposed upon *every* shipment, without regard to its interstate or domestic character. The prohibition, therefore, applies to all the business transacted by the carrier wholly within each State.

This would amount to a regulation by Congress of intratate or domestic commerce; for it would be an attempt by Congress to control the rate demanded by the carrier for services performed wholly within a State.

The fact that such a regulation is contained in a statute imposing a tax, would not avoid its illegality. A very great proportion of the instances in which this Court has overturned the action of States as constituting a regulation of interstate commerce have arisen upon statutes merely purporting to impose a tax.

As a State has no power, in any form, directly or indirectly, to enact a regulation of interstate commerce, or to impose a burden upon interstate commerce in any guise whatever, so the Congress has no power directly or indirectly to regulate domestic commerce or to impose any burden upon it.

Sixth Point. — The scrupulous care with which the statute employs the *impersonal* expression in every instance in which it speaks of

the affixing of the stamp is most significant. Such precision of language cannot be ascribed to chance or accident.

Section 6, as we have seen, lays the tax indifferently upon the person who issues a document or the person for whose use or benefit it is issued.

Section 7 imposes a penalty upon any person who issues a document, "*without the same being duly stamped.*" It does not say "without stamping the same."

Section 9 requires the stamp to be cancelled by "*the person using or affixing the same.*" It does not say "by the person issuing the document."

Section 10 imposing the penalty for evading the act by the use of unstamped documents says: "without *the same being duly stamped.*" It does not say "without stamping the same."

Section 13 imposes the penalty upon the person who registers, issues, sells or transfers a document mentioned in Schedule A, "*without the same being duly stamped.*" And all the provisions of Section 13 relating to relief against forfeiture are couched in equally impersonal form.

Section 18 prohibits telegraph companies from transmitting a dispatch "*without an adhesive stamp being affixed* to a copy thereof."

There are but two instances in which the act requires a particular person to affix the stamp upon a document mentioned in Schedule A. And these exceptional cases are very significant.

They are found in Sections 11 and 14. One is the requirement that the acception of a bill drawn in a foreign country, but payable in the United States, shall before paying or accepting the same "*place thereupon a stamp,*" etc. The other is the provision declaring that a bond or

certificate of stock issued in a foreign country shall pay a tax when issued, sold or transferred in the United States, and making it the duty of "the party to whom the same is issued, or by whom it is sold or transferred," to affix the stamp.

Evidently in these two cases, the act departs from the impersonal form and places the duty upon a given individual, because, as the instrument is created without the jurisdiction of the United States, the only effective way of collecting the tax is to require the person who first becomes a party to it within the jurisdiction to affix the stamp.

We have already commented on the use of the impersonal form in the express and freight clause. Perhaps it is more striking there than anywhere else, because of the sudden change of the phraseology.

"It *shall be the duty of every carrier* to issue to the shipper a bill of lading, *and there shall be duly attached and cancelled,* as in this act provided." (*i. e.*, by either carrier or shipper), to each of said bills of lading a stamp, etc. Surely if the meaning of Congress was that which the decision below imputes to it, this is an extraordinary way of expressing it.

How much easier and clearer to have merely continued the same form of expression and said: "It *shall be the duty* of every carrier *to issue* to the shipper a bill of lading, *and to attach and cancel,* etc.

Seventh Point.—There is no allegation in the petition that the plaintiff-in-error demanded an unreasonable compensation for transportation in

any of the instances mentioned in the petition. That was not the nature of the complaint made, and the mandamus granted by the Supreme Court of Michigan cannot be justified as a command to the carrier to carry for a reasonable hire.

The case presented by the Attorney General was founded upon an assumed interpretation of the War Revenue Act and upon a general line of policy adopted by the plaintiff-in error in view of the situation in which it found itself by reason of that enactment. It was in this light that the case was decided by the Court. (See concluding portion of opinion, Record p. 21.)

What the Court decided was, that the Act made it the duty of the carrier to pay the tax; and that the company could not be allowed to shift the burden by adding the cost of the tax to its charges, because this would amount to "an evasion and a subterfuge to avoid the terms of the Act." (Record, p. 20.)

We have already endeavored to show that the notion upon which the Court proceded was wholly erroneous, and that far from making it the duty of the carrier to pay the tax, even in the first instance, the act by its express terms left the question of who should pay a matter of negotiation between shipper and carrier, and that the whole scheme of the legislation was consistent with this view and this only.

We will now, however, concede, for the sake of argument, that it is made the duty of the carrier to pay the tax in the first instance, that is to affix the stamp.

When the War Revenue Act became a law the Express Companies found themselves confronted by a situation of much gravity. They were entirely willing to bear their fair share of the public burden imposed by the expenses of war.

Apart from the tax provided in the Express

and Freight Clause, there were many taxes imposed by the act which fell upon their business.

Like other persons and organizations engaged in important business transactions, indeed, perhaps to a peculiar extent by reason of the immensity of detail involved in their business, they were at once subjected to a large number of taxes, not very large or burdensome in any particular instance, but amounting in the aggregate to very considerable sums.

They draw an enormous number of checks, they purchase and sell securities; they issue money orders, and other commercial documents; they send a great number of telegraph messages; they issue certificates of stock; they make entries at the custom house; they take out policies of insurance—in short, there is hardly a document among those enumerated in Schedule A which is not in one way or another in more or less frequent use by them. Upon all these documents taxes are imposed. In some instances, the burden is directly shifted and distributed according to the ordinary and natural laws of trade already referred to; in others, the process, if it takes place at all, is less direct and apparent. It may, however, be fairly said that in the case of a general documentary stamp tax, the probability is that the burden is, through this process of distribution, ultimately borne by each individual somewhat in proportion to the volume and activity of his business, and thus the express companies would bear their share of the general burden.

Confronted with the tax upon bills of lading, they found that if they assumed the burden of this themselves, they would be subjected to a taxation infinitely greater than that laid upon any other class of the community. Their business consists, among other things, of the transportation of a great number of small packages. In

this respect, it is wholly unlike that of the railroads, which are included in the same clause, imposing a tax upon bills of lading. A tax of one cent upon each bill of lading issued by a railroad would, in the aggregate, amount to a very small sum as compared with a similar tax upon bills of lading issued by an express company. The average bulk of railway shipments is so much greater, and the aggregate number of them is so much less, upon a business yielding the same gross revenue, that the tax laid upon the railroad becomes multiplied many times over when applied to an express company.

We believe that the tax on bills of lading laid upon railroads has not been found unduly burdensome upon them. Indeed, it is for this season that the railroad companies have in general assumed the payment of it themselves.

In the case of the express companies, however, conservative estimates have placed it as amounting to *between thirty and fifty per cent. of their entire net revenues from the business of transportation.* Such a tax, of course, presented a situation of the utmost gravity. If ultimately borne by the companies themselves, it would amount to *an income tax* of from *thirty to fifty per cent.* It cannot be supposed that Congress, in enacting a general revenue law, selected this particular business for the imposition of a tax so enormously disproportioned in its burden to all others imposed by the same law.

If borne by the shippers, however, this great injustice would disappear. It would bear with but little hardship upon any one shipper, because of its general distribution; and even then the process of distribution might, and doubtless would, proceed until the number of persons participating in the burden would cause its weight to bear so lightly upon each as not to be felt at all.

There were two courses open to the plaintiff-in-error:

One was to increase its rates generally to such an extent as to enable it to recover the amount of the tax from the shipper.

To this, however, there was an objection. Under the arrangements generally prevailing between express companies and railroads, the former pay a certain proportion of their gross receipts to the railroad companies as compensation for the facilities furnished them. This proportion is ordinarily about forty per cent of the gross receipts from the express business.

In order, therefore, to make good to themselves the amount expended for the bill of lading tax by a general increase of rates, the express companies would be obliged to raise their rates nearly double the amount of the tax, since forty per cent of the increased rate would have to be paid to the railroads.

This method, then, would have resulted in placing upon the shipper a burden nearly twice as great as the tax.

The other course was to collect from the shipper the exact amount of the tax in each instance, not as an increase in the rate as such, but as the reimbursement of an expense, which would not be regarded by the railroad companies as a portion of the gross receipts upon which their percentage was to be reckoned. This method was just to the shipper, as it took from him no more than the exact amount of the tax.

It was accordingly adopted; and it is to the adoption of this policy by the plaintiff in error that the defendant-in-error objects.

Its entire legality can be shown in a few words.

1. The principle of the shifting and distritribution of stamp and other excise and indirect

taxes is consistent with and essentially incident to the nature of such taxes, and has been in operation whenever such taxes have been in force.

2. The plaintiff-in-error is a common carrier. It is not a corporation, but an unincorporated association, purely the creature of private contract, and without any privileges, franchises or duties, save such as are enjoyed by or imposed upon any individual pursuing the same business.

The only obligation which it is under is to carry for a reasonable compensation. What is a reasonable compensation is a question into which many elements enter; and it is not necessary to discuss them. It is sufficient to say that if at a given time and under given circumstances, its rates are reasonable, and then some additional burden is placed upon it, involving a greater expense to it in performing the duty of carriage, an addition to the former rate of an amount equal to such additional expense would still leave the rate reasonable.

3. There is no allegation that the rates demanded and received by the plaintiff-in-error prior to the passage of the War Revenue Act were unreasonable, or that they were for any cause open to complaint or objection. Indeed, the petition itself seems to affirm the reasonableness of the rates; for it alleges that the plaintiff-in-error "has substantially refused to discharge its duty as a common carrier, and has, to a material degree, suspended the exercise of its functions and franchises by refusing to take goods * * * for transportation at the *usual rates and upon the usual terms*, * * *

except upon the consent of the shipper to pay the said stamp tax," etc.

(Record, p. 6).

This is clearly an implied statement that the *usual* rates and the *usual* terms were reasonable, and that the only thing complained of was the exaction of the cost of the tax from the shipper.

On the other hand, the answer, which, as the cause was heard upon petition and answer, must be taken as true, alleges that the rates as increased to meet the expense of the tax were "reasonable and just."

(Record, p. 11).

4. The learned Court below was of the opinion that any increase in rates should have been made in some different manner than by the addition of one cent to the charge for each shipment.

"To add one cent to every charge for car-
"riage," they say, "bears upon its face evi-
"dence of the attempt to evade the act.
"Where the charge established was twenty-
"five cents, it is now twenty-six cents; where
"it was fifty cents, it is now fifty-one cents;
"where one dollar, it is now one dollar and
"one cent, and so on, adding just one cent to
"each charge. It cannot be that this was
"done because the charge was too low for each
"carriage, however long the distance, or how-
"ever weighty the article. The statement of
"this claim is its own refutation."

(Record, p. 20).

The learned Judge delivering the opinion, forgets, however, that the tax constitutes an additional burden, not upon the general business of

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the company, but *specifically upon each shipment*. Where it formerly cost a certain amount to carry a parcel for which twenty-five cents was a reasonable charge, it now costs the company just one cent more for the carrying of that specific parcel. Nothing could be clearer than that the added expense is upon each transaction of carriage, and, therefore, the only reasonable and just method in which to increase the carrier's charge, is to increase it with respect to each shipment by the exact amount of additional expense attaching to such shipment.

Last Point.—The judgment of the Supreme Court of Michigan should be reversed, with costs.

LEWIS CASS LEDYARD,
Of Counsel for Plaintiff-in-Error.

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No. 723

Brief of Motion for O. E. (on

In the Supreme Court of the United States

October Term, 1908

No. 723

FRED. A. MAYLAND, Attorney General of the State of Michigan, on Relation of [illegible] Moore, et al.,

Petitioners and Defendants in Error,

vs.

THE AMERICAN EXPRESS COMPANY and CHARLES F. REED,

Respondents and Plaintiffs in Error.

MOTION, NOTICE AND BRIEF

In behalf of Defendant in Error, on Motion to Dismiss Writ of Error.

O. E. WARNER,

Attorney for Defendants in Error.

WISNER & HARVEY,

Attorney for Plaintiff in Error.

SUTTER PRINTING CO., DETROIT, MICH.

In the Supreme Court of the United States.

FRED. A. MAYNARD, Attorney General of the State of Michigan, on Relation of GEORGE F. MOORE, *et al.*,

Defendant in Error,

vs.

THE AMERICAN EXPRESS COMPANY, and CHARLES F. REED,

Plaintiffs in Error.

Now comes the said defendant in error, by C. E. Warner, his attorney, and moves the court to dismiss the writ of error, and remand said cause to the Supreme Court of the State of Michigan, for the following reasons, to-wit:

1. In that this court has no jurisdiction to hear and determine said cause.

2. In that no federal question is involved in said cause.

3. In that the writ of error herein was granted under and in pursuance of the provisions of section 709 of the United States Revised Statutes, while said suit or proceeding in said court, did not involve or draw in question the validity or construction of any statute of the United States, or any right, title, privilege or immunity set up or claimed thereunder.

4. In that said suit or proceeding in said state court did not involve or draw in question the validity of any

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treaty or statute of the United States, or any authority exercised under the United States, or any right, title, privilige or immunity claimed under the constitution, or any treaty or statute of, or commission held, or authority exercised under the United States.

5. In that the proceeding is not a "*suit*" within the sense of section 709, U. S Revised Statutes, or a proceeding of such character as will authorize a review in this court.

C. E. WARNER,
Attorney for Defendant in Error.

In the Supreme Court of the United States.

FRED. A. MAYNARD, Attorney General of the State of Michigan, on Relation of GEORGE F. MOORE, *et al.*,
Petitioner and Defendant in Error,
vs.
THE AMERICAN EXPRESS COMPANY, and CHARLES F. REED,
Respondents and Plaintiffs in Error.

GENTLEMEN:

You will please take notice that the foregoing is a true copy of a motion duly filed in the above entitled court and cause; and that the same will be submitted to said court, at Washington, D. C., on the ~~30th~~ 12th day of ~~April~~ May, A. D. 1899.

You are herewith served with a copy of the brief of argument of the defendant in error upon said motion.

C. E. WARNER,
Attorney for Defendant in Error.

To MESSRS. WISNER & HARVEY,
Attorneys for Plaintiffs in Error.
Dated, Detroit, April 4th, A. D. 1899.

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In the Supreme Court of the United States.

FRED. A. MAYNARD, Attorney General of the State of Michigan, on Relation of GEORGE F. MOORE, *et al.*,
Petitioner and Defendant in Error,
vs.
THE AMERICAN EXPRESS COMPANY and CHARLES F. REED,
Respondents and Plaintiffs in Error.

BRIEF IN BEHALF OF DEFENDANT IN ERROR.

BY C. E. WARNER.

This is a motion to dismiss the writ of error in the above cause, upon the ground that the suit or proceeding in the Supreme Court of the State of Michigan, to which the writ of error issued, did not *involve* or *draw in question* the validity of any statute of the United States, or any authority exercised thereunder, or any title, right, privilege or immunity claimed under the constitution, or any statute of the United States, whereby an appeal might be taken to this court.

At the outset, we may state that the plaintiff in error applied to the Chief Justice of the Supreme Court of the

State of Michigan, for a citation, when said Chief Justice referred the matter to the entire court, composed of the five judges of said court, when said citation was denied, upon the ground that no federal question was involved.

Plaintiff in error thereupon applied to one of the justices of this court, when the writ was granted, without, we assume, any particular investigation or consideration of the question as to whether or not the writ would properly issue.

STATEMENT OF THE CASE.

Plaintiff in error, the American Express Company, is a joint stock association, organized and existing under the laws of the State of New York, and was, and is, a common carrier, transacting the express business, and engaged in the business of receiving, carrying, forwarding and delivering goods, wares and merchandise, by express, for hire, from point to point throughout the various states and territories of the United States.

It maintained offices and did business in the State of Michigan.

It was an express company within the meaning of Schedule A of an act entitled an "Act to provide Ways and Means to meet War Expenditures, and for other Purposes," approved by the Congress of the United States, on June 13th, 1898.

This act provided among other things, that "it shall be the duty of every * * * express company, or corporation, or person, whose occupation is to act as such, to issue to the shipper or consignor, or his agent, or person from whom any goods are accepted for transporation, a bill of lading, manifest or other evidence of receipt and forwarding, for each shipment received for carriage and

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transportation, whether in bulk or in boxes, bales, packages, bundles, or not so enclosed or included, and there shall be duly attached and canceled, as in this act provided, to each of said bills of lading, manifests or other memorandum, and to each duplicate thereof, *a stamp of the value of one cent*, provided, &c."

While this act imposed the duty upon the express company, as contended by relator, to issue the receipts or bills of lading, and to attach the revenue stamp, yet the company refused to *accept goods for transportation*, unless the shipper or consignor should himself provide the stamp or pay for the same.

The petitioner, therefore, as Attorney General of the State of Michigan, upon the relation of the several persons mentioned in the petition, originally filed a petition in the circuit court for the County of Wayne, in proceedings in the nature of *mandamus*, wherein the petitioner prayed for an order, commanding the express company, and its agents and servants to receive, accept, transmit and deliver all such goods, wares and merchandise, as might be tendered to it when the fees and charges for such goods were paid, and to issue to the shipper or consignor a bill of lading, manifest or other evidence of receipt and forwarding, *with the stamp duly attached thereto, and canceled by it.*

An order to show cause was duly entered by said court, and the respondents thereupon appeared and filed an answer, and the cause or proceeding came on for hearing in due course before said court, when an order was entered and a mandamus issued in accordance with the prayer of the petition.

Inasmuch as the record herein is not yet printed, we take the liberty of appending hereto a copy of the petition, answer and order, which are marked Exhibits "A," "B" and "C," respectively.

Upon such order being granted, the plaintiffs in error herein, applied for a writ of *certiorari* from the Supreme Court of the State of Michigan, and the case was thereupon certified by the court below, to such court.

The cause came on for hearing before the supreme court in due course, when a decision was rendered affirming the decision of the court below.

The decision of the Supreme Court of Michigan may be found in 77 N. W. Rep., p. 317.

From this decision, plaintiffs in error, as above stated, first applied to the Chief Justice of the Supreme Court of the State of Michigan for a citation, upon writ of error from this court, when said Chief Justice took the advice of the remaining members of the court, and thereupon denied the application for such citation, on the ground that no federal question was involved.

Plaintiffs in error thereupon secured the writ of error from this court.

ARGUMENT.

I.

It is contended that the suit or proceeding in the State Court did not involve or draw in question the validity of the statute in question, or any authority exercised under it, or any title, right, privilege, or immunity claimed under the constitution or any statute of the United States, and that the writ of error should therefore be dismissed.

Whether the proceedings in the State Court drew in question the validity of the aforesaid statute, *depended upon the pleadings in said cause*, and we submit that when such pleadings are examined, and particularly the

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answer of the respondent, it will clearly appear that the validity or construction of such statute or any right thereunder, was not involved. The respondent substantially admitted or conceded the obligation upon its part, to primarily pay the tax, but contended that upon such payment, it had the right to raise its rate for transportation by the amount of such stamp tax.

This question, we submit, involved purely the common law right of the express company to raise or regulate its rates for transportation, and did not therefore involve either the validity or construction of the statute in question.

Let us therefore examine the answer to determine what issue was raised by it.

We give such parts of the answer as have a bearing upon the question:

(a) That under the terms of the Act of Congress, properly construed, it is not made respondent's duty to pay said tax, only when some party who would be a shipper, mutually agrees with respondent to enter into the relation of shipper and carrier; and said party has tendered for shipment some article to be carried by defendant, which it has accepted for that purpose, then and only then, is respondent liable under said Act to provide and attach said stamp. Ans., Par. 3.

(b) That it is the policy of all taxation laws under this government, that such burdens imposed thereby, shall be as generally and equitably distributed as is possible, in order that said tax burden may be cast upon the many, as a small burden, rather than it should be a larger one cast upon the few. *That in the Act, Congress seems carefully to have refrained from providing, as between shipper and carrier, which shall bear the burden of the tax, thereby evidently intending to leave it a matter of adjustment by the parties, with the stringent condition, however, that*

if their necessities require them to enter into the business relation of shipper and carrier as a condition precedent to their acting as such, the tax must be paid. Par. 6.

(c) That respondent, regularly organized and existing under and by virtue of the laws of New York—and acting under regularly issued license of this state--by it organization and compliance with the laws of this state as admitted in paragraph 5 of said petition to have been done, *became vested with the right to exist in a corporate capacity, and to regulate the carrying on of its business by reasonable rules and regulations, and to fix and insist upon the payment of such rates of transportation as it deems best, provided the same are not unreasonable in amount nor in manner of payment."* Par 7.

(d) That the enactment of the stamp act referred to, being an important change in the then condition of things, it became necessary for respondent to change and regulate its method of transacting its business and to re establish its rates of transportation, so that it might meet that change in a way to prevent its resources from being so depleted as to weaken its financial condition.

Respondent, therefore, decided to raise and did raise its rates of transportation to an amount reasonable and just and only necessary to meet the change of conditions made by said act, and save itself from great loss of revenue and profits as compared with its earnings before the passage of said act. And respondent submits and asserts that it had the full and perfect right to make such change in its method of transacting its business and in its former rates for transportation. Par. 8.

(e) That under its right to regulate its manner of doing business and regulating its rates, and with a view, as far as possible under the circumstances, of accommodating the public so far as paying said increase of rates, respond-

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ent has accorded to responsible shippers, the right to pay such increase (either using a stamp or money for the purpose) upon delivery of the goods, and the privilege of paying the balance of the rate of transportation at the point of delivering to the consignee. (Par. 9.)

(f) That respondent admits that *the regulation of its business affairs and change in its rate of transportation as above stated, in effect throws the burden of the said tax upon the shipper by force of circumstances, and that such effect is in accordance with the principle of taxation before referred to, that the burden should be distributed equitably among the many rather than be cast upon the few.* * * * *

(g) Therefore respondent submits that it has not been guilty of any violation of its duty as common carrier, that the effect of so doing throws the burden of tax upon the shipper, does not in any way lessen, or limit, or interfere *with the respondents' right to manage its business and regulate its rates of charge and that the changes made in that regard are reasonable and proper.* Par. 10.

It will be noted, therefore, that the express company did not, by its answer, draw in question the validity of the statute aforesaid or its construction. *It placed itself squarely upon its right, in view of the act, to regulate its rates of transportation.* This involved purely a common law right or privilege, and no right, title, privilege, or immunity by virtue of the statute.

The company practically recognized that the stamp tax was primarily imposed upon it, and that such stamp tax "*made it necessary for respondent to change and regulate its methods of transacting its business, and to re-establish its rates of transportation.*"

Surely if the law in question imposed the obligation

upon the shipper, or if the company so contended, and insisted upon the performance of this obligation by the shipper, then there would have been no occasion for the company to "*change and regulate*" its method of transacting its business, Not paying the tax itself, there would be no occasion for it to raise its rates by the amount of such stamp tax.

The company says, in its answer, that *such regulations and re-establishment* "throws the burden of the said tax upon the shipper by force of circumstances, and that such effect is in accordance with the principle of taxation before referred to."

The contention, therefore, did not involve the validity or construction of a statute of the United States, or a right, title, privilege or immunity set up or claimed thereunder; but, on the contrary, involved only the common law right of the express company, as a common carrier, to regulate its rates by imposing increased burdens upon shippers, in view of the tax which the act of congress had imposed upon it.

Error will not lie to a state court, unless a Federal question was actually raised and decided, *or necessarily involved in its judgment.* It is not enough that a Federal question might be raised.

See *Hagar vs. California, 154 U. S., 639.*
Crowell vs. Randall, 10 Pet., 368.
Edwards vs. Elliott, 21 Wall., 532-558.
Eustis vs. Bolles, 150 U. S., 361.
Murdock vs. Memphis, 20 Wall., 590.
Cook Co. vs. Calumet, &c., Co., 138 U. S., 635.
Wade vs. Lauder, 165 U. S., 624.
Harrison vs. Morton, 18 Sup. Ct. Rep., 742-5.

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In the case at bar, the express company specifically set up and claimed its right to raise and regulate its rates for transportation.

Had the law imposed the obligation to pay the tax upon the shipper, then there would have been no occasion to raise and regulate its rates. Upon the other hand, had the law imposed the obligation upon the express company itself, then there was involved the question as to the right of the express company to regulate and raise such rates for transportation, and this was the question which was distinctly presented to the court below for determination. This did not set up or involve any Federal question, *but was a distinct and independent question*, and therefore fell within the rule of the cases cited, *supra*.

In order to appeal to this court the decision of the state court must have been "against the title, right, privilege, or immunity *specially set up or claimed*."

Respondent did not *set up* or *claim* any right, title, privilege, or immunity by force of the statute. It contended purely and simply that it had the right, *as a common law right*, to raise and regulate its rates.

The rule as laid down by this court is strict. The Federal question must be necessarily involved in the judgment of the state court. Even though a Federal question was involved and decided by the state court, yet where such court also decides against the plaintiff, upon an independent ground, not involving a Federal question, the writ of error will be dismissed without considering the federal question.

Rutland R. Co vs. Central Vt. R. Co., 159 U. S., 630.

It has been held by this court that a simple *construction* of a state statute, or of an Act of Congress, in a terri-

tory, will not confer upon this court authority to review the action of the state court.

Linford vs. Ellison, 155 U. S., 503.

In the latter case it was held that in order to give this court jurisdiction, the validity of a patent or a copyright must have been involved, *or the validity of a treaty or statute of, or an authority exercised under the United States, must have been drawn in question.*

True, this latter decision applied to an Act of Congress in the Territory of Utah, but the language of the statute granting the right to take writ of error to this court, is substantially the same as that involved in *section 709, supra*, in so far as it applies to the validity of a treaty or statute, or any authority exercised under the United States.

The only other clause of section 709, which would seem to have any application to the controversy, is the clause providing that "where any title, right, privilege or immunity is claimed under the constitution, or any treaty or statute of, or commission held, or authority exercised under the United States, and the decision is against the title, right, privilege or immunity, specially set up or claimed." But as we have seen, this right, title, privilege or immunity *must be specially set up or claimed;* and we submit that it is not so claimed or made an issue by the answer.

In the late case of *Kipley vs. People of Illinois*, 18 Sup. Ct. Rep., 550, this court decided that when the jurisdiction of this court is invoked for the protection against the final judgment of the highest court of the state, of some title, right, privilege or immunity, secured by the constitution or laws of the United States, it must appear expressly or by necessary intendment from the record,

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that such right, title, privilege or immunity was "*specially set up or claimed*" under such constitution or laws.

The court say:

> "*Our jurisdiction cannot arise in such case from inference, but only from averments so distinct and positive as to place it beyond question that the party bringing the case up intended to assert the Federal right.*"
>
> *Oxley Stave Co. vs. Butler Co., 166 U. S., 648.*
>
> *Levy vs. Superior Court, 167 U. S., 175.*

In *Muse vs. Arlington Hotel Co., 18 Sup. Ct. Rep., 109-111*, this court say:

> "As ruled in *Ansbro vs. U. S., 159 U. S., 695-697*, a case may be said to involve the construction or application of the constitution of the United States, when a right, title, privilege or immunity is claimed under that instrument, *but a definite issue in respect to the decision of the right must be distinctly deducible from the record*, before the judgment of the court below can be reviewed on the ground of error in the disposition of such a claim by its decision."

In *Oxley Stave Co. vs. Butler Co., supra*, this court say:

> "The words "*specially set up or claimed*" imply that if a party intends to invoke for the protection of his rights, the constitution of the United States, or some treaty, statute, commission or authority of the United States, he must so declare, and unless he does so declare specially, that is unmistakably, this

> court is without authority to re-examine the final judgment of the state court. This statutory requirement is not met if such declaration is so general in its character, that the purpose of the party to assert a Federal right is left to mere inference. It is the settled doctrine of this court that the jurisdiction of the Circuit Court of the United States must appear affirmatively from the record, and that it is not sufficient that it may be inferred affirmatively from the facts stated." * * * "Upon like grounds, the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference, *but only from averments so distinct and positive as to place it beyond question that the party bringing the case here from such court intended to assert a right.*"

This opinion was cited and adopted in the case of *Union Mut. Life Ins. Co. vs. Kirschoff*, *18 Sup. Ct. Rep., 260.*

In U. S. vs. Lynch, 137 U. S., 280, this court holds that the validity of a statute was not drawn in question every time rights claimed under such statute were controverted; nor was the validity of an authority, every time an act done by such authority was disputed.

The court say:

> "The validity of a statute, or the validity of an authority, is drawn in question when the existence or constitutionality, or legality of such statute or authority is denied, and the denial forms the subject of direct inquiry."

See, also, *Railroad Co. vs. Hopkins, 130 U. S., 210.*

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South Carolina vs. Seymour, 153 U. S., 353.

Snow vs. United States, 118 U. S., 346-353.

District of Columbia vs. Gannon, 130 U. S., 227.

The respondent, by its answer, has in fact practically disclaimed any reliance upon the statute for its right to regulate its rates.

By paragraph 6 it says, that in the act, Congress seems carefully to have refrained from providing, as between shipper and carrier, which shall bear the burden of the tax, thereby intending to leave it a matter of adjustment by the parties, with the stringent condition, however, that if their necessities require them to enter into the business relation of shipper and carrier, as a condition precedent to their acting as such, the tax must be paid.

Where, therefore, let us ask, has the respondent *set up or claimed* any title, right, privilege or immunity under a statute of the United States, or where is the validity of a statute drawn in question?

None can be found in the answer of the respondent. The contention is based solely and exclusively upon its right to regulate its manner of doing business, and to regulate and re-establish its rates ond charges. This is purely a question, arising under the laws of the State of Michigan, not involving a federal question, federal statute, or any right, title, privilege, claim or immunity under a statute of the United States.

II.

We submit further, that the case is not of that character which will authorize a review in this court under the *U. S. Revised Statutes, Sec. 709.*

The proceeding in the state court was by *mandamus*, not to enforce the collection of a judgment, but to enforce the obligation of the Express Company to *accept* for transportation goods which might be tendered to it for that purpose.

The Act of Congress provides for review of a final judgment or decree "*in any suit*" in the highest court of the state.

The proceeding in question would not seem to be of that character which is contemplated by the statute in question. Sec. 1000 of the U. S. Revised Statutes, which provides for a bond in cases of this character, apparently contemplates cases involving a *money judgment.* No money judgment is involved in the proceeding at bar. No better case can probably be found for an illustration than the case at bar.

An order was originally entered in the State Court, granting a writ of mandamus on Sept. 16, 1898. The defendant took a writ of *certiorari* to the Supreme Court, which operated as a stay of proceedings, and from the decision of the State Court, a writ of error was issued from this court, which operates under the bond, as a further stay.

Now, in the face of the decision in the lower court, the respondent has continued, and still continues, to exact the payment of the stamp tax by the shipper, and the at-

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torney general and the citizens of the State of Michigan, whom he represents, are practically remediless.

We are aware that this court has held, in some cases, that an order awarding a peremptory writ of *mandamus* is a final judgment in a civil action, within the meaning of that term, as used in the statute regulating writs of error.

Davies, Collector, vs. Corbin, 112 U. S., 36.
Hartman vs. Greenhow, 102 U. S., 672.

But in these cases, the mandamus was a proceeding practically to enforce the payment of a judgment. Such cases partake of the nature of an execution to enforce the collection of the judgment, and can only be got by instituting an independent suit for that purpose.

Davies vs. Corbin, Supra.

In *Bath Company vs. Amy, 13 Wall., 244*, it was held that the *circuit courts* of the United States are not authorized to issue writs of mandamus as an original proceeding, nor at all, except when necessary for the exercise of their respective jurisdictions.

Mr Justice Strong says:

> "While it may be admitted that *in some senses* the writ of mandamus may properly be denominated a suit at law, it is still material to inquire whether it was intended to be embraced in the gift of power to hear and determine all suits at common law, of a civil nature, conferred by the judiciary act." * * * "Were there nothing more in the judiciary act than the grant of general authority to take cognizance of all suits of a civil nature at com-

> mon law, it might well be doubted whether it was intended to confer the extraordinary powers residing in the British Court of King's Bench to award prerogative writs. All doubts upon this subject, however, are set at rest by the 14th section of the same act, which enacts that circuit courts shall have 'power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, *which may be necessary to the exercise of their respective jurisdictions*, and agreeable to the principles and usages of law.'"

It will be seen, therefore, that the jurisdiction in mandamus cases is awarded to the circuit courts, not because the proceedings is a "*suit at law*" but because the 14th section provides that they shall have power to issue all writs *which may be necessary to the exercise of their respective jurisdictions.*

In *County of San Mateo vs. Southern Pacific R. Co.*, 13 F. R.. 145, Mr. Justice Field held:

That the term "*suits of a civil nature*" used in the act of 1875, providing for the removal of causes from the state court into the circuit courts, are less comprehensive than the term "cases" in the fourteenth amendment of the Federal constitution, as the latter may embrace proceedings not usually nor strictly termed suits.

The cases which have come under our observation in which it has been held that this court might review proceedings of this character, are cases in which mandamus has been issued by the circuit courts while "*in the exercise of their respective jurisdictions*," while the suit at bar was a proceeding not according to the course of the common law; not in the nature of an execution to enforce the

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collection of a judgment; not like a creditor's bill which is resorted to in aid of execution ; not in any manner involving the payment of money, but upon the contrary, a suit to enforce the obligation of the express company, as a common carrier, to receive, accept and transmit packages tendered to it.

We submit, therefore, that the writ of error should be dismissed.

C. E. WARNER,
Att'y for Def'ts in Error.

EXHIBIT A.

PETITION FOR MANDAMUS.

THE CIRCUIT COURT FOR THE COUNTY OF WAYNE.

TO THE CIRCUIT COURT FOR THE COUNTY OF WAYNE.

The petition of Fred A. Maynard, Attorney General of the State of Michigan, at the relation of George F. Moore, Ransom Gillis, Charles Buncher, Frank S. Munger, Abram P. Sherrill, and James S. Meredith, as survivors of themselves and James L. Edson, deceased, composing the firm of Edson, Moore & Co.; Henry A. Krolik and Herman Krolik, composing the firm of A. Krolik & Co.; William H. Strong, James L. Lee, Hal. W. Glover and George R. Treble, composing the firm of Strong, Lee & Co.; James W. Fales and William J. Fales, composing the firm of J. W. Fales & Co.; James K. Burnham, Albert H. Munger, Frederick C. Stoepel, Joseph J. Crowley and James Wilson, composing the firm of Burnham, Stoepel & Co., and the American Harrow Co., a body corporate, respectfully represents:

1. That the American Express Company, the respondent herein, is a joint stock association, organized and existing under the laws of the State of New York, and having its principal business office located in the City of New York, in said State.

2. That said company is a common carrier, transacting the express business, so-called, and is engaged in the business of receiving, carrying, forwarding, and delivering goods, wares and merchandise, by express, for hire, on behalf of all persons who may see fit to require its services, from point to point, throughout the various states and territories of the United States, and particularly from point to point in the State of Michigan.

3. That on the 29th day of January, A. D. 1897, said

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company had four hundred and eighty-nine (489) agencies or places of business in the State of Michigan alone, at which agencies or places of business, said company received goods, wares and merchandise, in boxes, bales, packages, bundles or otherwise, for transmission or transportation, for hire, to various points in the State of Michigan, and throughout the United States, and was then, and still is, a common carrier, holding itself out to the public as authorized to receive, carry and deliver such boxes, bales, packages, or bundles, &c.

4 That the business of the said company was and is large and lucrative, and that by the annual report of said company, filed in the office of the State Treasurer of the State of Michigan, on the 29th day of January, 1897, the said company then represented that its business was represented by one hundred and eighty thousand (180,000) shares, and that the working fund of the association was fixed at five million, three hundred thousand dollars, ($5,300,000,) and that the amount of their gross receipts on their current business, in the State of Michigan, for the year ending December 31st, 1896, was the sum of one hundred thirty thousand, four hundred fifty nine and 25-100 dollars, ($130,459.25,) and that said statementrepresents, substantially, as petitioner is informed and believes, the situation and condition of said company at the present time.

5. That Chapter 103, of Howell's Statutes of the State of Michigan, provides that it shall not be lawful for any person or persons to act within this state, as agent or officer, in transacting the express business, or the fordwarding of packages or parcels by express, for any company, association or individual, without first procuring a certificate of authority or license from the State Treasurer of this State, and before obtaining such certificate, such company, association, individual, agent or agents, is required to furnish to the State Treasurer of the State of Michigan,

annually, in the month of January in each year, with a statement, under oath, of the president, treasurer, secretary or general agent of such company, association or individual, showing:

First. The name and locality of the company or association.

Second. The amount of its capital stock, and how much is paid upon such stock.

Third. The number of agencies or places of business of said company in this state.

Fourth. The amount of gross receipts on their current business in this state, for the year ending December 31st, next preceding such report.

And the said express company, association or firm, corporation or individual, complying with the requirements of said act, and receiving a certificate or license from the State Treasurer of the State, was, and is, by said act, permitted to do business freely in any part of the state.

6. And your petitioner represents, upon information and belief, that the said American Express Company, respondent, has substantially complied with the terms and provisions of said act, and thereupon received a permit and license to do business in the State of Michigan; and, in pursuance thereof, is authorized to do business in said state, and to receive, accept and transmit packages from point to point, throughout the United States; and your petitioner represents that it is the duty of the said respondent to so receive, accept and transmit said packages, when duly offered or tendered to it for that purpose, and the charges thereof paid or tendered.

7. That the business of said company is of a public or quasi public character, and a public function used and exercised by said company for the people at large throughout the State of Michigan, as well as other states of the United States, and in which the public has a substantial

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interest, and the abuse or misuse of which is of a substantial nature.

8. That the persons, at whose relation this proceeding is instituted by the Attorney General of the State, constitute a portion of the people of the State of Michigan, and the public at large; and that the refusal of the respondent to receive, accept and transmit goods, wares and merchandise, as hereinafter more particularly stated and represented, constitutes but a few out of many cases of like character, and are presented for the purpose of representing the uniform course and practice of the respondent company.

9. Your petitioner further represents that on June 13th, 1898, the Congress of the United States passed an Act entitled:

"An Act to Provide Ways and Means to meet War Expenditures, and for other Purposes;" and that said Act, among other things, provides:

"Express and Freight. It shall be the duty of every railroad or steamboat company, carrier, express company or corporation, or person whose occupation is to act as such, to issue to the shipper or consignor, or his agent, or person from whom any goods are accepted for transportation, a bill of lading, manifest, or other evidence of receipt and forwarding for each shipment received for carriage and transportation, whether in bulk, or in boxes, bales, packages, bundles, or not so enclosed or included; and that there shall be duly attached and canceled, as in this Act provided, to each of said bills of lading, manifest or other memorandum, and to each duplicate thereof, a stamp of the value of one cent; provided, that but one bill of lading shall be required on bundles or packages of newspapers when enclosed in one general bundle at the time of shipment. Any failure to issue such bill of lading, manifest or other memorandum, as herein provided, shall subject such

railroad or steamboat company, carrier, express company or corporation, or person, to a penalty of fifty dollars for each offense, and no such bill of lading, manifest, or other memorandum shall be used in evidence, unless it shall be duly stamped as aforesaid."

10. That by reason of a desire of the respondent to avoid the payment of the stamp tax so called, and to impose such obligation upon the shipper, the respondent herein refuses to accept any goods for transportation, unless such shipper attaches the stamp to the said bill of lading, manifest or other evidence of receipt and forwarding for each shipment, or furnishes the money and means for that purpose to the said company, and that the said company thereby not only avoids its duty, under said Act of Congress, to pay and bear its proportion of the revenues to meet war expenditures, as provided by said Act, but violates its duty as a common carrier to receive, accept, transport and deliver such goods, wares and merchandise, so offered and tendered to it for that purpose; and in support thereof, your petitioner represents:

(a) That on the 1st day of July, A. D. 1898, the firm of Edson, Moore & Co., as hereinbefore mentioned, presented, tendered and offered a box, bale, package, bundle or parcel, to said express company for shipment and transportation, and that said company refused to receive, accept, ship and transport the same, or to issue to the said shipper a receipt therefor, unless a stamp, of the value of one cent was paid or provided by said Edson, Moore & Co.

(b) That on the 1st day of July, A. D. 1898, the firm of A. Krolik & Co., as hereinbefore mentioned, presented, tendered and offered a box, bale, package, bundle or parcel to said express company for shipment and transportation, and that said company refused to receive, accept, ship and transport same, or to issue to the said shipper a

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receipt therefor, unless a stamp of the value of one cent, was paid or provided by said A. Krolik & Co.

(c) That on the 1st day of July, A. D. 1898, the firm of Strong, Lee & Co., as hereinbefore mentioned, presented, tendered and offered a box, bale, package, bundle or parcel to said express company for shipment and transportation, and that said express company refused to receive, accept, ship and transport the same, or to issue to the said shipper a receipt therefor, unless a stamp of the value of one cent was paid, or provided by said Strong, Lee & Co.

(d) That on the 2nd day of July, A. D. 1898, the firm of J. W. Fales & Co., as hereinbefore mentioned, presented, tendered and offered a box, bale, package, bundle or parcel to said express company for shipment and transportation, and that said company refused, to receive, accept, ship and transport the same, or to issue to the said shipper a receipt therefor, unless a stamp of the value of one cent was paid or provided by said J. W. Fales & Co.

(e) That on the 7th day of July, A. D. 1898, the firm of Burnham, Stoepel & Co., as hereinbefore mentioned, presented, tendered and offered a box, bale, package, bundle or parcel to said express company for shipment and transportation, and that said company refused to receive, accept, ship and transport the same, or to issue to the said shipper a receipt therefor, unless a stamp of the value of one cent was paid or provided by said Burnham, Stoepel & Co.

(f) That on the 2nd day of August, A. D. 1898, the American Harrow Co., a body corporate, as hereinbefore mentioned, presented, tendered and offered a box, bale, package, bundle or parcel to said express company for shipment and transportation, and that said company refused to receive, accept, ship and transport the same, or to issue to the said shipper a receipt therefor, unless a

stamp of the value of one cent, was paid or provided by said American Harrow Co.

11. As before stated, your petitioner represents that the above and foregoing constitute but a few of many instances of like character, and that it is the uniform course and practice of the said respondent to refuse to receive, accept, transport, carry and deliver such goods, wares and merchandise, in boxes, bales, packages, bundles or otherwise, unless the said stamp tax is paid, or provided by said shipper.

12. Your petitioner represents that the said American Express Company, respondent herein, has substantially refused to discharge its duty as a common carrier, and has to a material degree, suspended the exercise of its functions and franchises by refusing to take goods, wares and merchandise in boxes, packages, bales, parcels, &c., which have been offered and tendered to it at its places of business and agencies in the city of Detroit, for transportation at the usual rates, and upon the usual terms, and has refused to accept and transport a great part of the goods, wares and merchandise duly offered and tendered to it, except upon the consent of the shipper to pay the said stamp tax so-called, whereby great loss and damage has accrued to the people of the State, and the trade and commerce of the people of the State is greatly injured by the refusal and neglect of said respondent company to perform its duties of carrier, unless the stamp tax so-called is paid by the shipper and consignors so tendering such goods to said company for transportation.

Your petitioner therefore prays that a peremptory mandamus may issue to the said The American Express Company, and Charles F. Reed, the local agent thereof, respondents, and to its officers, agents and servants, commanding it and them to receive, accept, transmit and deliver any and all goods, wares and merchandise duly of-

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fered or tendered to it, in boxes, bales, packages or bundles, or not so enclosed or included for transportation, when the fees and charges for such goods are paid, offered or tendered to said company, and to issue to the shippers or consignors throughout the State of Michigan, or their agent or agents, or persons from whom any such goods are received for transportation, a bill of lading, manifest or other evidence of receipt and forwarding for each shipment received for carriage and transportation, with the stamp duly attached thereto and canceled by it, as provided by the Act of Congress hereinbefore mentioned, and without demanding or requiring of such consignors or shippers the said stamp, or the value thereof.

(Signed,) FRED A. MAYNARD,
Attorney General of the State of Michigan.
WARNER, CODD & WARNER,
Attorneys for Petitioner.

The above petition was duly verified, and affidavits in support of it duly attached.

EXHIBIT B.

ANSWER.

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE.

FRED A. MAYNARD, *Attorney-General, etc.*, On the relation of George F. Moore, Ransom Gillis, Charles Buncher, Frank S. Munger, Abram P. Sherrill and James S. Meredith, as survivors of themselves and James L. Edson, deceased, composing the firm of Edson, Moore & Co. *et al.*, *vs.* THE AMERICAN EXPRESS COMPANY.	No. 38,638.

The answer of the American Express Company, respondent, to the petition of the Attorney-General of the State of Michigan, in the above entitled cause, and the order of this Court commanding it to show cause on the 8th day of August, inst., why the prayer of said petition should not be granted, respectfully shows:

1.

That the allegations of fact in paragraphs 1, 2, 3 and 4 are true as stated, except that part of paragraph 4 which alleges that "the statement of respondent's business, as shown by its report filed with the State Treasurer January 29th, 1897, represents the situation and condition at the present time," which respondent denies.

2.

That the allegations in paragraph 5, 6, 7, 8 and 9 respondent admits to be true.

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3.

That as to paragraph 10, respondent does not admit its desire to avoid paying the stamp tax, so-called; but submits that under the terms of said act of Congress, properly construed, it is not made respondent's duty to pay said tax, only when some party who would be a shipper, mutually agrees with respondent to enter into the relation of shipper and carrier; and said party has tendered for shipment some article to be carried by defendant, which it has accepted for that purpose, then, and only then, is respondent liable under said Act to provide and attach said stamp. That by requiring in the manner it does, as hereinafter stated, every person who seeks its service as carrier, to bear the burden of said tax, respondent does not in any way violate, nor has it in any way violated, its duty as common carrier.

4.

That in paragraph 6 said petitioner admits and alleges, and it is undoubtedly true, "that it is the duty of respond-"ent to receive and accept and transmit said packages "when duly offered and tendered to it for that purpose, "*and the charges therefor paid or tendered*," and respondent shows that, in the case of pretended violation of its duties, specified and set forth in paragraph 10 of said petition, and in the cases of such violation generally referred to in paragraph 11 of said petition, *it is not pretended nor alleged that in any case were* "the charges therefor paid *or tendered*," *which* should have been the case, to have made it the duty of respondent to accept any or all of said packages as claimed.

5.

That said petition in paragraph 12 states that this respondent "*has* refused to discharge its duty as common carrier;" and "*has*, to a material degree, suspended the exercise of its function;" and "*has* refused to accept and transport a great part of the goods, wares and merchandise duly offered and tendered to it, except upon the consent of the shipper to pay the said stamp tax, whereby great loss and damage *has* accrued to the people of the State;" and "the trade and commerce is greatly injured by the refusal and neglect of said respondent company to perform its duties of carrier, unless the stamp tax so-called is paid by shipper and consignor so tendering such goods to said company for transportation."

That respondent submits that such acts and refusals on its part, as so alleged, do not make or present a case or cases susceptible of being rectified, reformed or punished at the instigation of the Attorney-General, or any other person, by use of the writ of Mandamus, nor do such acts and refusals make or constitute any case within the jurisdiction of this court.

6.

This respondent further shows:

That it is the policy of all taxation laws under this government that such burdens imposed thereby shall be as generally and equitably distributed as is possible, in order that such tax burden may be cast upon the many as a small burden rather than it should be a larger one cast upon the few.

That in the act, Congress seems carefully to have refrained from providing, as between shipper and carrier, which shall bear the burden of the tax, thereby evidently

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intending to leave it a matter of adjustment by the parties, with the stringent condition, however, that if their necessities require them to enter into the business relation of shipper and carrier, as a condition precedent to their acting as such, the tax must be paid.

7.

That respondent, regularly organized and existing under and by virtue of the laws of New York—and acting under regularly issued license of this State—by its organization and compliance with the laws of this State as admitted in paragraph 5 of said petition to have been done, became vested with the right to exist in a corporate capacity, and to regulate the carrying on of its business by reasonable rules and regulations, and to fix and insist upon the payment of such rates of transportation as it deems best, provided the same are not unreasonable in amount nor in manner of payment.

8.

That the enactment of the Stamp Act referred to, being an *important change* in the then condition of things, it became necessary for respondent to change and regulate its method of transacting its business, and to re-establish its rates of transportation, so that it might meet *that change* in a way to prevent its resources from being so depleted as to weaken its financial condition.

Respondent, therefore, decided to raise, and did raise, its rates of transportation to an amount reasonable and just and only necessary to meet the change of conditions made by said Act, and save itself from great loss of revenue and profits as compared with its earnings before the passage of said Act.

And respondent submits and asserts that it had the full

and perfect right to make such change in its method of transacting its business and in its former rates of transportation.

9.

That in many cases it has been customary, though not obligatory upon respondent, for it to accommodate shippers by carrying their packages and collecting the transportation charges from the consignee, at the point of delivery, a privilege of great value to shippers and of great convenience to them, and one wholly within the discreton of respondent to stop or deny at any time.

That under its right to regulate its manner of doing business and regulating its rates, and with a view, as far as possible under the circumstances, of accommodating the public so far as paying said increase of rates, respondent has accorded to responsible shippers the right to pay such increase (either using a stamp or money for the purpose) upon delivery of the goods, and the privilege of paying the balance of the rate of transportation at the point of delivery to the consignee.

10

Respondent admits that the regulation of its business affairs and change in its rate of transportation as above stated, in effect, throws the burden of the said tax upon the shipper by force of circumstances, and that such effect is in accordance with the principle of taxation before referred to, that the burden should be distributed equitably among the many rather than be cast upon the few. That should respondent be compelled to pay said tax, of which the expense thereof would amount to many thousands of dollars, without its right to guard against the effect of such expenditure in the manner adopted by it in raising

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its rate of transportation as it has done, its financial condition would be greatly weakened.

Therefore respondent submits that it has not been guilty of any violation of its duty as common carrier; that the effect of so doing throws the burden of tax upon the shipper, does not in any way lessen, or limit, or interfere with the respondent's right to manage its business and regulate its rates of charges, and that the changes made in that regard are reasonable and proper; and that the petition herein does not make or state a case that will warrant this court in granting the prayer thereof.

Wherefore respondent prays that the prayer of said petition be denied and the petition dismissed.

WISNER & HARVEY,
Attorneys for Respondent.
H. C. WISNER,
Counsel.

.....
Respondent.

EXHIBIT C.

At a session of the circuit court for the county of Wayne, held at court room No. 4 of said court, on Sept. 21st, 1898. Present, Hon. R. E. Frazer, circuit judge.

FRED A. MAYNARD, Attorney General, *ex rel.*, GEORGE F. MOORE, *et al.*, *vs.* AMERICAN EXPRESS CO., and CHARLES F. REED.	No. 38,638

The above entitled cause having heretofore, on the 13th day of August, 1898, been submitted for hearing on petition and answer, and the same having been duly considered, it is now by the court ordered that a writ of mandamus do issue, in accordance with the prayer of said petition.

And it is further ordered that a stay of all proceedings be had for the period of ten days from this date.

This order will be entered *nunc pro tunc* as of Sept. 21st, 1898.

R. E. FRAZER,
Circuit Judge.

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